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In the Supreme Court of the United States

OCTOBER TERM 1978

No. 78-669

ELLSWORTH FREIGHT LINES INC., et al.,
Appellants,

vs.

MISSOURI HIGHWAY RECIPROCITY COMMISSION, et al.,
Respondents.

On Appeal from the Supreme Court of the State of Missouri

Jurisdictional Statement

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Jurisdictional Statement

OPINION BELOW

The opinion of the Supreme Court of Missouri is set forth in Appendix B hereto. The opinion and judgment of the Circuit Court of Missouri is set forth as Appendix A.

JURISDICTION

Jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257 (2), this being an appeal which draws into question the validity of 136.035 R.S. Mo. 1969 as applied to federal

claims on the ground that it is repugnant to the Constitution of the United States, Article VI, The Supremacy Clause.

Appellants also contend that the judgment is founded on other errors, which, though not subject to review by this court on appeal, nevertheless caused the dismissal of substantial federal claims found by the Missouri Circuit Court. These errors are included in the statement of the questions presented by the appeal, hereinafter set forth. See *Prudential Insurance Co. v. Cheek,* 259 U.S. 530 (1922).

Appellants on behalf of a class of four thousand members of the trucking industry were awarded judgments by the Circuit Court of Missouri based on the following violations by the Missouri Highway Commission of the United States Constitution and Federal Law.

1) The Imposition of Unconstitutional Burdens on Interstate Commerce.
2) Denial of Equal Protection under the Fourteenth Amendment.
3) Denial of Privileges and Immunities of Citizenship forbidden by Article IV, § 2.
4) Violation of the Due Process Clause of the Fourteenth Amendment.
5) Impairing the Obligations of Contract.
6) Violation of the interstate "Uniform Compact".

The sole defense asserted to these violations by the Missouri Commission was sovereign immunity as the basis for the limitations of Section 136.035 R.S. Mo. 1969. Before the Circuit Court of Missouri, appellants successfully argued that sovereign immunity and the application of Section 136.035 to federal claims violated Article VI, Supremacy Clause, of the United States Constitution. (See Appendix A). The Missouri Supreme Court reversed and

ordered the dismissal of all the federal claims on July 24, 1978 (Appendix B). No petition for rehearing was filed. Timely notice of appeal to this Court was filed in the Supreme Court of Missouri on October 19, 1978. As the Supreme Court of Missouri explicitly rejected appellants' challenge to Section 136.035, under the Supremacy Clause this matter is appropriately brought to this Court by appeal. See *Sibron v. New York,* 392 U.S. 40 (1968).

In the event that the Court does not consider appeal the proper mode of review, appellant requests that the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. § 2103.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions of the Constitution of the United States: Article IV, Supremacy Clause; Unconstitutional Burdens on Interstate Commerce, Impairing the Obligations of Contract, Article IV, § 2 Privileges and Immunities of Citizenship; and the Fourteenth Amendment, (Equal Protection; Due Process and Privilege and Immunity Clauses).

This case also involves the use of Section 136.035 (1) and (3) of Revised Statutes of Missouri to defeat federal claims against the state. That section provides:

> "1. The director of revenue from funds appropriated, shall refund any overpayment or erroneous payment of any tax which the state is authorized to collect. The general assembly shall appropriate and set aside funds sufficient for the use of the director of revenue to make refunds authorized by this section or by final judgment of court".
>
> "3. No refund shall be made by the director of revenue unless a claim for refund has been filed with

him within two years from the date of payment. Every claim must be in writing under oath and must state the specific grounds upon which the claim is founded".

QUESTIONS FOR CONSIDERATION

1. Whether the Supreme Court of Missouri erred in asserting the sovereign immunity of Missouri to dismiss lower court judgments against the State based on Federal Constitutional Violations and Violations of an Interstate Compact.

2. Whether the Supreme Court of Missouri erred in employing Section 136.035, R.S. Mo. 1969 as a local rule of practice which totally defeated the federal claims against the state of five of the eight named plaintiffs and all of the unnamed members of the class and which substantially limited and impaired the federal claims of the remaining three named plaintiffs.

3. Whether the Supreme Court of Missouri erred in dismissing judgments based on United States Constitutional Violations and Violations of an Interstate Compact on the grounds that the exclusive remedy was before the Missouri Department of Revenue and Tax Commission and that appellants failed to exhaust administrative remedies when:

a. The exclusive jurisdiction of such administrative agencies was founded on sovereign immunity.

b. Such administrative agencies could not hear or decide federal claims against the state or indeed any cases in which the central issues are matters of law.

c. Such agencies had already ruled contrary to appellants' contentions and thus compliance would be futile.

d. Such agencies cannot entertain class action claims, although such claims are authorized by Federal and general Missouri law.

e. Such agencies apply a two year statute of limitations to claims against the state, although the general Missouri Statute applicable to Constitutional claims is five years.

f. Such agencies do not toll the statute of limitations by the pendency of class actions or by estoppel despite federal law to the contrary.

g. Such agencies do not award interest on refund judgments notwithstanding federal law that liquidated federal claims in state courts must bear interest.

h. Such administrative agencies have delayed hearings and proceedings for almost *nine* years.

Statement of the Case

BACKGROUND OF THE UNIFORM COMPACT

Prior to the signing of the Vehicle Registration Proration and Reciprocity Agreement (hereafter Uniform Compact), there was extensive conflict between the states concerning the taxation of commercial vehicles. Most state license taxes were based on "residence": once residence was determined, the state of residence would collect the full taxes for that vehicle and other states would grant reciprocity for the vehicle without additional fees. It soon became apparent, however, that the residency and reciprocity method of vehicle taxation was unfair.

To resolve these conflicts 17 states and British Columbia, entered into the Uniform Compact which sets out a fair allocation formula based on reasonable use of a state's highways. This allocation formula is referred to herein as the "total fleet miles formula" and is based upon the miles traveled within a state as the numerator and the total fleet miles traveled in all other states as the denominator. *State ex rel Brady Motor Inc. v. State Tax Commission,* 517 S.W.2d 133 (Mo. 1974).

On November 9, 1959, the Missouri Highway Reciprocity Commission entered in the Uniform Compact.

Thereafter, the State of Missouri received all of the benefits of the Uniform Compact including the allocation of fees from interstate carriers which it would not otherwise have received. That the state Commission had the authority to enter the compact and to subject itself to suit thereon is the holding of the Missouri Supreme Court in *State ex rel Brady Motor Inc. v. State Tax Commission, supra,* at 134.

As noted below, by entering the Uniform Compact the state has submitted itself to federal law and to obligations rising out of federal law.

VIOLATION OF THE UNIFORM COMPACT BY MISSOURI AS A RETALIATION TO IOWA'S ILLEGAL ACTION

The State of Iowa, initially by administrative action and subsequently by statute, violated the terms of the Uniform Compact to which it was a signatory and commenced charging Missouri carriers in excess of the total fleet mile formula. The Missouri Highway Commission, as shown by its minutes of June 25, 1965, decided to retaliate "to try and bring them (Iowa) back into line. . . ." (Tr. 144, Pl. Ex. 13, p. 26-32) *State ex rel Brady Motor Inc. v. State Tax Commission, supra,* at 135.

The Missouri Highway Reciprocity Commission commenced violating the provision of the Uniform Compact in three ways.

A. Compact Miles Formula

From 1966 until approximately 1972, Missouri enforced the so-called compact miles formula against carriers which were based in Iowa, South Dakota, and North Dakota. Under this formula the numerator was miles traveled in

Missouri but the denominator included only the miles traveled in states which were parties to the interstate compact. In other words, miles traveled in interstate commerce in states that were not parties to the uniform compact were not permitted to be added to the denominator. The result was an overcharge to the carrier in violation of the Uniform Compact. (Tr. 144, Pl. Ex. 13, Tr. 113-117)

The illegality of this overcharge was determined by the Supreme Court of Missouri in the case of *State ex rel. Brady Motor, Inc. v. The State Tax Commission, supra.* The Missouri Circuit Court found that this formula bore no reasonable relationship to highway use. (Tr. 145)

B. The Gulick Gimmick

The second violation of the Uniform Compact was in the use of the so-called "Gulick Gimmick" which was imposed on Missouri based carriers only. Under the Gulick Gimmick the Missouri based carrier was required to add to its numerator all miles traveled in states not a party to the Uniform Compact. The denominator was made up of total miles traveled in all states. Thus the carrier paid charges for miles traveled in interstate commerce in numerous states to the east and south of Missouri which were not members of the compact. (Tr. 145, Pl. Ex. 13, Tr. 113-117) The Missouri Circuit Court found that this formula violated the Uniform Compact and bore no reasonable relationship to the use of Missouri highways. (Tr. 145)

C. Special Deals

The third violation of the Uniform Compact consisted in special allocation deals granted by the defendants to preferred carriers, who by reason of buying a "negotiated" number of license plates for vehicles were then not sub-

ject to the dollar proration formula of the Uniform Compact. (Tr. 146, Pl. Ex. 13)

These violations resulted in the following:

1. Discrimination between different categories of carriers. Carriers based in Iowa and South and North Dakota were charged using a compact miles formula as a retaliation while carriers based in other compact states paid using the total fleet mile formula. (Pl. Ex. 13, p. 41-53)

2. The elusive concept of residency was restored contrary to the purpose and provisions of the Uniform Compact as a determinor of fees. There was discrimination between Missouri-based and non-Missouri based carriers. (Pl. Ex. 13, p. 41-53)

3. Carriers traveling in non-compact states were frequently charged special taxes by such states in lieu of license fees, such as ton-miles taxes or special property taxes or negotiated allocation payments. (Pl. Ex. 13, p. 44; Tr. 120-121) In applying its compact mile and Gulick Gimmick formulas the Missouri Commission forced the inclusion of miles traveled in such states. The result was multiple taxation and a discrimination between interstate carriers traveling in non-compact states who paid multiple taxes and carriers traveling intrastate or within compact states only which avoided such multiple taxation.

In 1967 the executive director of the Missouri Highway Commission represented to attorneys for the plaintiff class that if Iowa was "straightened out" and forced to refund money to Missouri carriers, Missouri would give refunds to overcharged Iowa carriers without the necessity of filing litigation. These assurances were relied upon by the trucking industry. (Tr. 59, Pl. Ex. 13, p. 67-68) In 1968 the Supreme Court of Iowa unanimously required the State of Iowa to honor its contractual agreement under the Uniform

Compact and issued refunds to all carriers that have been overcharged, including Missouri carriers.

See:

Consolidated Freightways Corp. of Delaware v. Nicholas, 258 Iowa 115, 137 N.W.2d 900 (1965)

General Expressways, Inc. v. Iowa Reciprocity Board, 163 N.W.2d 413 (Iowa 1968)

The Missouri Commission, however, reneged on its promise, refusing to refund the overcharges to Iowa and other carriers, thereby forcing the instant litigation.

PROCEDURAL HISTORY OF THE ACTION

A. Administrative Proceedings

Based upon the representations of the Missouri Reciprocity Commission that their claims would be paid when Iowa gave refunds to Missouri carriers, Ellsworth Freight Lines, Inc., Hirschbach Motor Lines, Inc., and Kroblin Refrigerated Xpress Inc. individually, and on behalf of a class, filed claims for a refund of overpaid registration and license fees with the Department of Revenue in December, 1969. The Department of Revenue held an administrative hearing on the matter on June 25, 1970, at which time evidence was heard and briefs and exhibits were presented. (Pl. Ex. 13) The Department then stalled appellees' claims without ruling for over three years while it decided the related *Brady Motor* claim within six months and expedited a judicial determination and appeal in the *Brady* case.

On June 6, 1973, the Missouri Director of Revenue denied the plaintiffs' refund requests (Pl. Ex. 4, 5 and 6). In order to preserve the record, claimants filed a petition for writ of Review on July 6, 1973. (Pl. Ex. 8) By letter dated July 6, 1973, claimants were told by the State Tax Commission:

"This is to acknowledge receipt of the above referred to petition and advise that all parties concerned will be notified of the time and place of hearing in ample time to appear for same." (Pl. Ex. 7)

No time and place was ever set by the Tax Commission during the five years prior to the Missouri Supreme Court opinion. Thus almost nine years elapsed without administrative action on the Truckers' petition prior to the Missouri Supreme Court opinion.

B. Filing of the Instant Action

When it became apparent that the Missouri Commission did not intend to honor its commitment to make refunds, eight Iowa based trucking companies and two Missouri based trucking companies, on behalf of themselves and all others similarily situated, filed a lawsuit in the Circuit Court of Cole County against the Missouri Highway Reciprocity Commission.

C. The Class Action Determination

The claims for refund before the Missouri Commission, as well as the instant litigation, were both filed as class actions. The facts establishing this as an appropriate class action are undisputed and established by the testimony of the Secretary of the Missouri Reciprocity Commission, as well as by plaintiffs' representatives.

Two judges of the circuit court upheld the instant action as a class action. Notice to more than 4,000 carriers pursuant to class action rulings were mailed (Tr. 88). Only a small number opted out of the case.

D. The Trial of the Actions

This action was tried before the Circuit Court of Cole County on December 12, 1975. The Missouri Commission

did not attempt to contradict the extensive evidence of constitutional violations and presented no witnesses on its behalf. Indeed the parties stipulated to the key facts and exhibits which established the causes of action (Tr. 102).*

The sole defenses of the Missouri Commission were that the Commission may assert sovereign immunity to require Chapter 136 as the exclusive remedy applicable to the case, and that appellees have failed to exhaust their administrative remedies under Chapter 136. Contentions that sovereign immunity and the use of Chapter 136 violated the Supremacy Clause were raised and accepted by the Circuit Court (See Appendix A)

E. The Circuit Court of Missouri Judgment Found That the Missouri Reciprocity Commission Violated the United States Constitution and Federal Law

The Missouri Circuit Court findings and conclusions are attached hereto as Appendix A and establish the following violations of the United States Constitution and Laws:

1. The Compact Miles Formula "did not bear a reasonable relationship to the use of the Missouri Highways and resulted in many instances in double charges for the carrier". (Tr. 145, Appendix A)

2. The Gulick Gimmick charges on Missouri based carriers "did not bear a reasonable relationship to their use of the Missouri Highways, and such carriers were forced to pay double or more in numerous instances . . ." (Tr. 145, Appendix A)

3. "The above violations and each of them created an unreasonable burden on Interstate Commerce and violated the due process, equal protection and privileges and immunities of the plaintiff". (Tr. 146, Appendix A)

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*The entire record in this case is relatively brief, consisting of 154 double spaced typewritten pages.

4. "The actions by the Missouri Reciprocity Commission constitute a violation of the United States Constitution in imposing unreasonable burdens on interstate commerce, denials of the privileges and immunities of citizenship, violation of due process rights, and denials of equal protection of the laws. Further, such violations contravene the constitutional prohibition against impairing the obligations of contract". (Tr. 150, Appendix A)

F. The Ruling of the Missouri Supreme Court

An appeal was taken directly by the Commission to the Missouri Supreme Court. The issue on the appeal was whether the Commission may assert sovereign immunity and require the use of administrative proceedings under Section 136.035 R.S. Mo. The Trucking Companies contended that such use of Section 136.035 as applied to federal rights violated the supremacy clause of the United States Constitution and acted to defeat, diminish and qualify federal rights by local rules of practice in violation of established federal decisions. (See Appendix B)

In its opinion of July 24, 1978 attached hereto as Appendix B, the Missouri Supreme Court upheld the applicability of Section 136 to the truckers' claims based on the doctrine of sovereign immunity. It ordered that all the federal claims be dismissed and that these matters must proceed exclusively before the Missouri Director of Revenue as refund claims. The result of the Missouri Supreme Court judgment is as follows:

1. All federal claims against the State based on the United States Constitution and the interstate Uniform Compact are totally defeated. The administrative agency does not have the power to rule upon such Federal Claims. (See below)

2. Only three of the eight plaintiffs who filed individual administrative claims for refund will be permitted any recovery. All other named plaintiffs and all

unnamed members of the class are denied any recovery whatsoever since the administrative agency does not recognize class action refund claims and does not accept that any class action brought before Missouri Courts pursuant to Missouri Rules of Practice or refunds sought on behalf of a class may operate to toll the two year statute of limitations under Section 136.035(3).

3. The three named plaintiffs who filed individual claims will be limited to recovery of two years of overcharges, rather than the five years permitted under the general Missouri statutes relating to constitutional rights.

4. The three named plaintiffs who filed individual claims will not recover interest on their overcharges which have now been held by the state for over nine years because Missouri practice does not authorize interest payment on refund claims. Federal cases establish that interest must be paid on such liquidated Federal claims brought before a state court.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

Even if this case involved only the rights of the litigants, it is substantial in its impact. The established federal claims of several thousand trucking firms have been dismissed. These firms relied upon representations of the Missouri Commission that their class action claims would be honored without difficulty. After many years of stalling by the Missouri administrative agencies, the litigants are informed that class action claims will not be accepted, that the statute of limitations has run on their individual claims, that there is no tolling of claims by the pendency of class actions, and that their federal claims will be dismissed based upon the asserted sovereign immunity of Missouri.

Such a result is contrary to the equities and federal law established by this court.

But the effect of this litigation is far broader than the rights of the litigants. Compacts between states have increasingly been used as methods of securing interstate cooperation to meet multi-state problems. If states are able to immunize or protect their own conduct in violation of such compacts by asserting sovereign immunity or other procedural barriers to enforcement, the meaning and use of such agreements will be greatly diminished.

Equally significant is the long range impact of this action on the enforcement of federal claims in state courts. If states are permitted to dismiss or qualify such claims against the state by use of sovereign immunity or local forms of practice, the use of concurrent jurisdiction in state courts will diminish and forum-shopping will result. Moreover, since federal claims asserted by a private litigant against a state itself must be brought in state court under the eleventh amendment, the result of the Missouri Supreme Court ruling is drastically to impair the assertion of all federal claims against a state.

Finally, the judgment of the Missouri Supreme Court is erroneous and in conflict with substantial rulings of this court and United States Courts of Appeal, as shown by the following sections. Such significant conflicts should be resolved.

In this action, as described in further detail below, the state of Missouri has effectively defeated federal claims by requiring their submission to state administrative agencies which cannot consider such claims, which apply a two year statute of limitations without tolling by the pendency of a class action or estoppel, which refuse to recognize class actions, and which do not award interest on their judgments, all contrary to federal law.

A. There Is No Sovereign Immunity Protecting a State Against Suits Based on Federal Constitutional Violations or Violations of Interstate Compacts.

The sole defense in this action is the alleged sovereign immunity of the State of Missouri. That immunity, according to the Missouri Supreme Court, entitles the state to limit, condition and restrict the manner of presenting the claims herein in accordance with Chap. 136 R.S. Mo. 1969 and requires the exhaustion of administrative remedies under that chapter.

This holding is erroneous. There is no state sovereign immunity to violations of constitutional or other federally protected rights. By joining the United States, a state makes the Constitution of the United States its own law which is supreme and cannot be impaired, qualified or conditioned by any concepts of state sovereign immunity. U.S. Constitution, Article VI, Supremacy Clause; *McCulloch v. Maryland,* 3 Wheat. 316 (1819)

See,

Bell v. Wolf, 496 F.2d 1252 (8th Cir. 1974), (In a civil rights action against a State Warden, the court held that a federally created cause of action cannot be restricted by state laws concerning official privilege or immunity.)

Hampton v. City of Chicago, 284 F.2d 602 (7th Cir. 1973), (Suits against Illinois state attorneys and others for violation of federal civil rights. Held state immunity defense has no application by reason of the supremacy clause.)

In short, the lower court had the jurisdiction to decide the Uniform Compact federal rights and constitutional rights raised in this action. Indeed state courts have not only concurrent jurisdiction but the obligation to guard and

enforce every right secured by the constitution and laws of the United States not exclusively granted to the federal courts.

U.S. v. Bank of New York & Trust Co., 296 U.S. 463, 565 Ct. 343, 80 L.Ed. 331 (1936)

B. The State of Missouri May Not Qualify or Condition Federal Rights by Local Rules of Practice Including Chapter 136 RS Mo 1969.

The supremacy clause and the absence of sovereign immunity means that local state forms of practice may not be applied to qualify, condition or impair federally created rights brought in state courts.

In *Dice v. Akron, Canton and Youngstown Railroad Co.,* 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952), this court held that all defenses in state court to federal causes of action are matters of Federal law. Moreover, state rules on jury versus judge determination were set aside as to a federal cause of action under the FELA tried in state court. In *Davis v. Wechsler,* 263 U.S. 22, 44 S. Ct. 13 68 L. Ed. 143 (1923), the Supreme Court reversing Missouri courts held that a state could not apply local rules relating to waivers by general appearance in a federal law matter.

Under this doctrine, state pleading rules have been held inapplicable to Federal claims brought in state court.

See:

Wright v. State of Georgia, 373 U.S. 284, 83 S.Ct. 1240, 10 L.Ed.2d 349 (1963)

State rules requiring the filing of claims as a prerequisite to litigation and applying state limitations periods are inapplicable to federal rights brought in state court.

See:

Cox v. Roth, 348 U.S. 207, 75 S. Ct. 242, 99 L. Ed. 260 (1955), (Action under Jones Act against estates in which no notice of claim had been filed as required by local Florida law. Held the state requirements relating to estates cannot effect or diminish the period of filing Federal Jones Act claims.)

Williams v. Horvath, 16 Cal. 3d 834, 548 Pac.2d 1125 (1976) (California requirement that tort claims against state or other governmental entities be filed with appropriate administrative agency within 100 days of accrual of cause of action held not constitutionally permissible against Federal Civil Rights claims in state court.)

See Also:

Willis v. Reddin, 418 F.2d 702 (9th Cir. 1969); *Donovan v. Reinbold,* 433 F.2d 738 (9th Cir. 1970); (holdings to same effect as *Williams v. Horvath.*)

Local rules on interest on judgments do not govern claims on federal rights brought in state court.

See:

Board of Com'rs of Jackson County, Kan. v. United States, 308 U.S. 343, 60 S. Ct. 285, 84 L.Ed. 313 (1939) (In determining the rights of Indians under U.S. Treaties, the local Kansas law forbidding interest on any improperly collected taxes will not be followed—federal law must govern . . . nor "are the federal courts restricted to the remedies available in state courts in enforcing such federal rights . . ." (308 U.S. at 350-1)).

In short, a state by reason of the supremacy clause may not condition, burden or in any manner control federal rights.

See:

Nash v. Florida Industrial Commission, 389 U.S. 235, 88 S. Ct. 362, 19 L. Ed.2d 438 (1967), (Flor-

ida's refusal to pay unemployment insurance to persons who preferred unfair labor practice charges against former employer held invalid. Citing *McCulloch v. Maryland,* the court declared the states devoid of power "to retard, impede, burden, or in any manner control . . ." the constitution and laws of the United States (389 U.S. at 240))

The above principles govern not only the constitutional violations found by the lower court but also the claims for violation of the Uniform Compact.

By signing the Uniform Proration and Registration Compact, the State of Missouri entered into interstate relationships and interstate commerce which are subject to the regulation and control of the federal government. It has long been held that all such interstate agreements (including any defenses thereto) and state activities within the area of interstate commerce are governed by federal, not state law.

See:

Petty v. Tennessee Missouri Bridge Commission, 359 U.S. 275, 79 S. Ct. 785, 3 L.Ed.2d 804 (1958)

Parden v. Terminal Railway of the Alabama State Docks Department, 337 U.S. 184, 84 S. Ct. 1207, 12 L.Ed.2d 233 (1964)

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C. The Supreme Court of Missouri Erred in Dismissing Judgments Based on Federal Claims on the Grounds that the Exclusive Remedy Was Before the Missouri Department of Revenue and Tax Commission and That Appellants Failed to Exhaust Their Administrative Remedies.

The premise of the Missouri Supreme Court decision is that, because of sovereign immunity, exclusive jurisdiction

lies with Missouri administrative agencies. This premise is fallacious; there is no state sovereign immunity as shown by the prior two sections of this jurisdictional statement. The following are additional reasons why this judgment was erroneous.

1. Such administrative agencies cannot hear or decide federal claims or indeed any cases in which the central issues are matters of constitutional law. *Straube v. Bowling Green Gas Co.,* 227 S.W. 2d 666 (Mo. Sup. Ct. 1950) declared the limited power of Missouri's administrative agencies as follows: "Hence the commission has no power to exercise or perform a judicial function [here, adjudicating vested property rights] or . . . to declare or enforce any principle of law or equity." 227 S.W. 2d at 669 citing *American Petroleum Exchange v. Public Service Commission,* 172 S.W. 2d 952 (Mo Sup 1943). *Accord. United States v. Louisville & Nashville R. R. Co.,* 21 F. 2d 698 (6th Circ. 1955), *Cepero v. Pan Am Airways,* 195 F 2d 453 (1st Circ. 1952) *cert. den.* 354 U.S. 927.

See also: *Superior Press Brick Co. v. City of St. Louis,* 152 S.W. 2d 178 (1941); *Superior Press Brick Co. v. City of St. Louis,* 155 S.W. 2d 290 (1941) "the exception [. . . to exhaustion of remedy at law] is where the case involves the constitutionality of the ordinance . . . in which event a court of equity would have jurisdiction." 155 S.W. 2d at 295.

2. The rule relating to exhaustion of administrative remedies will not be applied where compliance would be futile, e.g., where the administrative agency has already ruled on the matter in controversy. See *Ogletree v. McNamara,* 449 F.2d 93 (6th Cir. 1971). As noted above, these administrative agencies have rejected appellants' contentions in the related case of *State ex rel. Brady Motor Inc. v. State Tax Commission, supra.*

3. Where the contention is made that an administrative agency is without jurisdiction to determine the controversy, e.g., the matter is one of federal law, not of just state law, the exhaustion doctrine is inapplicable. See *Varney v. Warehime,* 147 F.2d 238 (6th Cir. 1945) and *State v. Blair,* 146 S.W.2d 865, 347 Mo. 220 (1940).

4. Federal law should govern this case involving federal claims and class actions are proper thereunder. At the time of the hearing on the class action issue, the Missouri Circuit Court received overwhelming and uncontroverted evidence favoring the plaintiffs on each of the elements of an appropriate class action pursuant to Federal Rule 23 and the Missouri Supreme Court Rule 52.08. The court entered findings favorable to the plaintiff and ruled that it was a proper class action. Subsequently, notice was sent to all members of the class notifying them of the pendency and binding character of the action and permitting them to opt out if they so desired.

The Missouri Supreme Court however has ordered that administrative agencies must hear these claims although class actions are not permitted before such agencies. *Charles v. Spradling,* 524 S.W.2d 820 (Mo. Banc. 1975). Thus, although both federal and general Missouri law authorize class actions, and although the industry has received and relied upon a Missouri courts' notice and ruling that this was an appropriate class action, the Missouri Supreme Court has dismissed all federal claims of unnamed members of the class against the state.

5. The overwhelming weight of authority, both federal and state, holds that the filing of a class action, even if the class action is subsequently declared invalid, tolls the statute of limitations as to all members of the class. *York v. Guaranteed Trust Co.,* 143 F.2d 503 (2d Cir. 1944), rev'd on other grounds, 326 U.S. 99 (1949). This principle was

clearly enunciated in a definitive opinion by this Court in *American Pipe & Constr. Co. v. Utah,* 414 U.S. 539 at 551, 94 S. Ct. 756, 38 L.Ed.2d at 725 (1974). See also: *Mizell v. North Broward Hospital District,* 427 F.2d 468 (5th Cir. 1970) which held that federal rules on tolling must be applied to state statutes of limitation in connection with federal cases.

Moreover, the federal law is that a promise or representation which induces delay in the filing of claims operates to toll the limitations period under principles of estoppel. *Tucker v. Owen,* 94 F.2d 49 (5th Cir.) The court below found such promises, misrepresentations, and reliance occurred in 1967. (Tr. 146, Appendix A)

Yet the effect of the Missouri Supreme Court opinion is to refer this action exclusively to administrative agencies which will not toll the statute of limitations by reason of the pendency of a class action or misrepresentations or estoppel. *Charles v. Spradling. supra.*

6. Federal not state law governs the granting of interest on these claims. See *Board of Com'rs of Jackson County, Kan. v. United States,* 308 U.S. 343 60 S. Ct. 285, 84 L.Ed. 313 (1939); Federal Statutory Law specifically authorizes such interest: Title 28 Section 1961. But the ruling of the Missouri Supreme Court refers this matter to Administrative Agencies which cannot award interest on such judgments. *State ex rel. Brady Motor, Inc. v. State Tax Commission, supra.*

7. The Missouri Supreme Court by upholding the application of Section 136.035 against the Supremacy Clause has limited federal claims against the state to a two year statute of limitations. Missouri's five year statute of limitations should be the governing limitation: § 516.120 R.S. Mo. 1969. The reduced period based on sovereign immunity is not permissible under the above cited cases.

8. The rule of failure to exhaust administrative agencies does not apply where the administrative proceedings have been used as a tool to delay, harass or to commit or accomplish a fraud. § 536.100 R.S. Mo. 1969, *United States v. Sunny Hill Farm Dairy Company,* 258 Fed. Supp. 94 (E.D. Mo. 1966).

Appellants have done everything within their power to assert their rights under section 136.035. A class action claim for a refund of overpaid registration and license fees was filed with the Department of Revenue in December, 1969. (Pl. Ex. 9, 10, and 11). The Department of Revenue held an administrative hearing on the matter on June 25, 1970. The Department took the plaintiffs' claims under advisement for over three years while it decided the related Brady Motor claim within six months and commenced various legal maneuvers as shown by that file.

On June 6, 1973 (after their individual claims were barred by a two year limitation), plaintiffs were notified that their class action claims were denied. (Pl. Ex. 4, 5 and 6). In order to preserve the record, claimants filed a Petition for Writ of Review on July 6, 1973. (Pl. Ex. 8) By letter dated July 6, 1973, claimants were told by the State Tax Commission:

> "This is to acknowledge receipt of the above referred to petition and advise that all parties concerned will be notified of the time and place of hearing in ample time to appear for same." (Pl. Ex. 7)

No time and place has ever been set by the Commission and an additional five years elapsed before the Missouri Supreme Court Opinion was issued. The decision holding that class action claims are not allowed under Section 136 did not appear until 1975. *(Charles v. Spradling, supra.)*

Thus, the State is seeking to take advantage of its own stalling, delay and misrepresentations occurring over a period of nine years.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the questions presented are substantial. Probable jurisdiction should be noted.

Respectfully submitted,

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Appendix A

ELLSWORTH FREIGHT LINES, INC., et al.,

vs.

MISSOURI HIGHWAY RECIPROCITY COMMISSION, et al.

Judgment of The Circuit Court of
Cole County, Missouri —

November 29, 1976

[Under date of November 29, 1976, the following entry appears of record in the office of the Circuit Clerk:]

"Now at this day this cause again being considered by the Court, and having heard the arguments and read the Briefs filed, the Court finds the issues in favor of the Relators and against the Respondents. Findings [142] of Fact, Conclusions of Law and Judgment, filed."

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

FINDINGS OF FACT

The Court makes the following findings of fact:

(1) On or about the 9th day of November, 1959, by virtue of the provisions of Section 301.277 R.S.Mo. 1959, The Missouri Highway Reciprocity Commission entered into an agreement with several of the states providing for the reciprocity and sharing of licensing fees of commercial vehicles, such agreement being denominated and known as the "Uniform Vehicle Registration Proration and Reciprocity Agreement," herein referred to as the Uniform Compact.

(2) The Uniform Compact had as its purpose the avoiding of unreasonable burdens on interstate commerce by

providing for a fair allocation of registration fees. A further purpose and intent was to provide uniform standards which would inure to the benefit of the trucking industry including plaintiffs herein. Bridge states such as Missouri, through which truckers passed without their necessarily being based in the state, were benefited by the Uniform Compact formula which allocated a portion of registration fees to the states according to the use of the highways in such state. The compact was also devised to eliminate the elusive concept of "residency" or "basing point" of an interstate trucker as a determinate of fees. To this end, the formula for allocation of [143] registration fees provided in the contract was as follows: Miles traveled in state as the numerator over total fleet miles traveled in all states as the denominator (hereinafter the total fleet mile formula). No distinction was made in the compact between vehicles that were base-plated within the State of Missouri, or base-plated elsewhere.

(3) The State of Iowa, initially by administrative action and subsequently by statute, violated the terms of the Uniform Compact to which it was a signatory and commenced charging Missouri carriers in excess of the uniform compact formula. The Missouri Highway Commission, as shown by its minutes of June 25, 1965, decided to retaliate "to try and bring them (Iowa) back into line. . . ."

The Missouri Highway Reciprocity Commission commenced violating in three ways the provisions of the Uniform Compact.

A. From 1966 until approximately 1972, Missouri enforced a so-called compact miles formula against carriers which were based in Iowa, South Dakota, North Dakota or other compact states. Under this formula the numerator was miles traveled in Missouri but the denominator included

only the miles traveled in states which were parties to the interstate compact. In other words, miles traveled in interstate commerce in states that were not parties to the uniform compact were not permitted to be added to the denominator. The result was an overcharge to the carrier in violation of the uniform compact. [144] The illegality of this overcharge was declared in the case of *Brady Motor Frate, Inc., et al. v. The State Tax Commission of the State of Missouri,* No. 25948, by the Supreme Court of Missouri. Refusing to give credit in the formula for miles traveled in states outside the Uniform Compact, meant that the charges did not bear a reasonable relationship to the use of Missouri highways and resulted in many instances in double charges for the carriers since they were also required to pay fees of various types in states that were not parties to the Uniform Compact.

B. The second violation of the Uniform Compact was in the use of the so-called "Gulick Gimmick" which was imposed on Missouri based carriers. Under the Gulick Gimmick the Missouri based carrier was required to add to its numerator all miles traveled in states not a party to the Uniform Compact. The denominator was made up of total miles traveled in all states. The carrier gave credit to Missouri and paid charges for miles traveled in interstate commerce in numerous states to the east and south of Missouri which were not members of the compact. These charges imposed on the Missouri based carriers did not bear a reasonable relationship to their use of the Missouri highways, and such carriers were forced to pay double or more in numerous instances because of special fees imposed upon them by the non-compact states.

C. The third violation of the Uniform Compact consisted [145] in special allocation deals granted by the defendants to preferred carriers, who by reason of buying a certain number of license plates for vehicles or other payments, were then excused from the proration formula of the Uniform Compact.

The above violations and each of them created an unreasonable burden on interstate commerce, and violated the due process, equal protection, and privileges and immunities of the plaintiffs.

(4) In 1967 the executive director of the Missouri Highway Commission represented to the attorneys for the plaintiff class of highway carriers, that if Iowa was "straightened out" and forced to refund money to the Missouri carriers, that Missouri would do the same without the necessity of filing litigation. These assurances were relied upon by the trucking industry which then continued in its legal action against the State of Iowa. (See testimony of June 22, 1973.) In 1968 and 1969, the Supreme Court of Iowa unanimously required the State of Iowa to honor its contractual agreement under the Uniform Compact and issued refunds to all carriers that had been overcharged, including Missouri carriers.

(5) Plaintiffs Ellsworth Freight Line, Inc., Hirschbach Motor Lines, Inc., and Kroblin Refrigerated Express, Inc. filed application for refund on behalf of the total group of carriers who had been overcharged with the Missouri Reciprocity Commission, on or about December 8, 1969. A hearing on said [146] refund application was held on June 25, 1970. Approximately three years later, the Missouri Director of Revenue denied the refund request for the individual plaintiffs, without specifically ruling on the class action refund claim. (Plaintiffs' Exhibits 4, 5, and 6).

(6) On July 6, 1973, Plaintiffs filed a Petition for Writ of Review (Exhibit 8) and thereupon received from representatives of the State Tax Commission, a letter stating that the matter would be set for a hearing and plaintiffs would be notified. (Plaintiffs' Exhibit 7) As of the date of the trial hereof, December 1975, no further administrative action had been taken.

(7) For the registration year 1973, the Uniform Compact was amended for the State of Missouri to permit certain of the practices complained of herein. Since plaintiffs, by stipulation, claim damages herein only through the year 1972, the court makes no finding concerning the validity or effect of such amendment.

(8) The instant action was filed on October 26, 1970, as a class action. A hearing on the class action motion was held on June 22, 1973, and approval was granted by this court for this matter to be conducted as a class action. The earlier findings confirming this action is hereby reaffirmed by this order. Appropriate notice to the class members and opportunity to opt out of the class was given in June 1975. [147] The vast majority of the class members chose to remain in the class.

(9) The refund affidavits of three of the named plaintiffs, without objection from the defendants, established the following total overcharges since 1966:

(a) Ellsworth Freight Lines, Inc., $10,791.28 (of which amount $4,678.17 were overcharges for the years 1966 and 1967).

(b) Hirschbach Motor Lines, Inc., $78,478.73 (of which $35,310.17 were overcharges for the years 1966 and 1967).

(c) Kroblin Refrigerated Express, Inc., $16,092.60 (including overcharges of $9,598.91 for the years 1966 and

1967). Judgment for these named plaintiffs in the total amounts of overpayment plus interest are hereby entered.

(10) The testimony and evidence introduced before the Department of Revenue on June 25, 1970 (plaintiffs' Exhibit 13), and the evidence introduced at the hearing on June 22, 1973, are hereby received in evidence as part of this record.

(11) By reason of stipulation of the parties, the claim for refund in damages in behalf of the remaining named and all unnamed plaintiffs will be submitted to this court following any adjudication on appeal of this judgment.

CONCLUSIONS OF LAW

The court makes the following conclusions of law: [148]

(1) The Uniform Compact which was entered into by the Missouri Highway Recipocity Commission, on or about November 9, 1959, is a valid and binding obligation of the State of Missouri and of the other states which are parties to said agreement. Plaintiffs herein are third party beneficiaries of said agreement and have standing to bring this action.

(2) The use by the Missouri Highway Commission of the compact miles formula and the Gulick Gimmick, is a breach of such agreement and unauthorized, invalid and unlawful. Overcharges by the State of Missouri pursuant to such violations do not bear a reasonable relationship to the use of Missouri highways, and constitute an unreasonable burden on interstate commerce, a denial of the privileges and immunities of citizenship and of due process, and a denial of equal protection of the plaintiff class.

(3) This action is appropriately and properly conducted as a class action pursuant to the applicable Missouri statutes and Supreme Court rules.

(4) The doctrine of sovereign immunity is not a defense to the claims in this case, and such claims are not subject to the requirements of Section 136.035 R.S. Missouri 1969. The claims of the plaintiffs Ellsworth, Hirschbach and Kroblin in the amounts set forth in finding the fact number 9, shall be paid to such plaintiffs together with interest from [149] December 8, 1969.

(5) In the alternative, if in any event, this matter should subsequently be held not to be an appropriate class action, this court concludes that the filing of the claim for refund on behalf of the class in December, 1969, operates to toll any Statutes of Limitations applicable to the filing of such claims and the alleged members of the class will be granted by this court a reasonable time within which to intervene in this action and before the State Tax Commission to file appropriate claims for refund.

(6) The actions by the Missouri Reciprocity Commission constitute a violation of the United States Constitution in imposing unreasonable burdens on interstate commerce, denials of the privileges and immunities of citizenship, violation of due process rights, and denials of equal protection of the laws. Further, such violations contravene the constitutional prohibition against impairing the obligations of contract.

(7) This action is not barred by any failure to exhaust administrative remedies. The issues herein are essentially judicial and constitutional and the administrative agency action on its face is void in violation of the constitution and Uniform Compact. Moreover, the administrative agency has already ruled on the matter in related cases and the six years of administrative delay in this action have resulted in the misuse of administrative proceedings. [150]

JUDGMENT AND DECREE

It is therefore ordered adjudged and decreed that refunds be paid to the following named plaintiffs in the amounts set forth by each of their names, together with interest thereon from December 8, 1969.

Ellsworth Freight Lines, Inc.	$10,791.28
Hirschbach Motor Lines, Inc.	78,478.73
Kroblin Refrigerated Express, Inc.	16,092.60

All of the legal issues involved in this matter by stipulation may be submitted on appeal from this judgment. A final accounting of the damages owing to unnamed plaintiffs or other named plaintiffs will be determined by this court following adjudication of this matter on appeal in accordance with that determination.

FILED:

NOVEMBER 29, 1976. [151]

Appendix B

Duplicate of Filing on
Jul 24 1978
In Office of
Clerk Supreme Court

Supreme Court of Missouri
en banc
No. 59981

ELLSWORTH FREIGHT LINES, INC.,
et al.,
Respondents,

vs.

MISSOURI HIGHWAY RECIPROCITY
COMMISSION, et al.,
Appellants.

APPEAL FROM THE CIRCUIT COURT OF
COLE COUNTY

HONORABLE BYRON L. KINDER, Judge

On October 26, 1970, eight Iowa based trucking companies and two Missouri based trucking companies, on behalf of themselves and all others similarly situated, filed a lawsuit in the Circuit Court of Cole County against the Missouri Highway Reciprocity Commission, its individual members, the State Treasurer, and the Director of the Division of Budget and Comptroller. This petition set forth four counts: Count I sought a declaratory judgment that certain practices, rules and regulations of the Missouri Highway Reciprocity Commission concerning the collection of motor vehicle registration fees were unconstitutional; Count II sought injunctive relief against those practices; Count III sought recovery of registration fees allegedly collected illegally by the Commission since 1960, along with interest;

and Count IV requested mandamus against the Director of Revenue, the Treasurer and the Comptroller for payment of the alleged excessive registration fees.

Three of the plaintiffs, Ellsworth Freight Lines, Inc., Hirschbach Motor Lines, Inc., and Kroblin Refrigerated Xpress, Inc., along with two other trucking firms, Bruce Motor Freight, Inc., and Brady Motor Frate, Inc., filed claims for refund with the Director of Revenue in late 1969 for motor vehicle registration fees allegedly collected in violation [1] of the Vehicle Registration Proration and Reciprocity Agreement (Uniform Compact) to which the State was a party. The hearing on the applications for refund was held before the Director of Revenue on June 25, 1970. Brady and Bruce appealed the adverse decisions from the Director of Revenue to the State Tax Commission and ultimately to this Court, where it was held that the formula used by the Missouri Highway Reciprocity Commission in determining registration fees had been improper but that the two-year statute of limitations contained in § 136.035, RSMo 1969, was applicable. State ex rel. Brady Motor, Inc., v. State Tax Commission, 517 S.W.2d 133 (Mo. 1974).

During the course of the action below, the Director of Revenue denied the claims of plaintiffs Ellsworth, Hirschbach and Kroblin, who filed a petition for writ of review of the Director's decision in the Circuit Court of Cole County and also filed an application for review of the Director's decision with the State Tax Commission. To date, no further action has taken place in the Tax Commission, or in the Circuit Court of Cole County on the petition for a writ of review.

Defendants filed a motion to dismiss the action below alleging, among other things, that the circuit court lacked jurisdiction over the subject matter because the petition

asserted a claim for money against the State to which the State had not consented, that the plaintiffs had not exhausted the administrative remedies available for recovery of taxes allegedly collected illegally, and that the petition constituted an improper attempt at a class action. The lower court overruled the motion, and allowed the action to proceed as a class action.

On December 12, 1975, the final hearing was held and a stipulation of facts was agreed to. This stipulation stated that plaintiffs' request for an injunction was now moot because the State had ceased certain practices complained of and an amendment to the Uniform Compact in 1972 by the State now allowed the Commission to calculate registration fees by utilizing the several formulas complained of by plaintiffs. For these reasons, plaintiffs indicated they were only seeking recovery of regis-[2]tration fees through the license year 1972. No preliminary writ of mandamus was issued by the trial court, so Count IV was not in issue.

The lower court entered judgment for the plaintiffs, concluding that the class action was proper, and that the refund of motor vehicle fees was not subject to the requirements of § 136.035, RSMo 1969, or any concept of sovereign immunity.

Defendants have appealed from the trial court's ruling, alleging that this action was an improper means of securing a refund of motor vehicle fees and that plaintiffs failed to exhaust their administrative remedies. Plaintiffs contend that they were entitled to sue in the trial court for a refund without exhausting administrative remedies because their basis for a refund is alleged violations of federal rights.

Section 136.035, RSMo 1969, provides:

> "1. The director of revenue from funds appropriated, shall refund any overpayment or erroneous payment of any tax which the state is authorized to collect. The general assembly shall appropriate and set aside funds sufficient for the use of the director of revenue to make refunds authorized by this section or by final judgment of court.
>
> "2. The director of revenue shall refund any overpayment or erroneous payment of any tax on intangible personal property and the amount refunded shall be charged against the next apportionment to the political subdivision which was the residence or situs of the taxpayer at the time the tax was paid.
>
> "3. No refund shall be made by the director of revenue unless a claim for refund has been filed with him within two years from the date of payment. Every claim must be in writing under oath and must state the specific grounds upon which the claim is founded."

Section 138.430, RSMo 1969, provides:

> "1. Any person, firm or corporation shall have the right to appeal to the state tax commission from any finding, order, decision, assessment or additional assessment made by the director of revenue, or by the state collector of revenue, under such rules and regulations as said commission shall prescribe. The state tax commission shall have authority to affirm, modify or reverse any such finding, order, decision, assessment or additional [3] assessment which is found to be unlawful, unfair, improper, arbitrary or capricious."

The State Tax Commission's decision is judicially reviewable under Supreme Court Rules 100.03 to 100.07, inclusive, by means of a writ of review. Gas Service Co. v. M.E. Morris, 353 S.W.2d 645 (Mo. 1962).

Plaintiffs in this cause, after having filed claims for refunds which were denied, chose not to pursue their administrative remedies, but instead to seek a refund by means of a declaratory judgment action and suit for recovery of taxes paid. This means of recovering taxes paid is not provided for by statute.

In a suit against the State for recovery of taxes, administrative procedures statutorily provided for are the exclusive means of recovery. In Gas Service Co. v. M.E. Morris, *supra,* at 655, this Court said:

> ". . . The legislature here provided for the taxpayer a procedure to recover a tax illegally collected and to that extent the state consented to be sued. Rogers v. Holmes, 214 Ore. 687, 332 P.2d 608, 611 (1, 2). When a state consents to be sued, it may be proceeded against only in the manner and to the extent provided by the statute; and the state may prescribe the procedure to be followed and such other terms and conditions as it sees fit. State ex rel. Leggett v. Jensen, Mo., 318 S.W.2d 353, 359; Kleban v. Morris, supra, 247 S.W.2d 840; American Steel & Wire Co. of New Jersey v. State, 49 Wash.2d 419, 302 P.2d 207, 210 (6, 7); Land Holding Corp. v. Board of Finance & Revenue, 388 Pa. 61, 130 A.2d 700, 703(1-3); Executive Air Service v. Division of Fisheries & Game, Mass., 173 N.E.2d 614, 615(1, 2). Thus, if as in the present instance the only method and procedure provided for the recovery of illegally collected taxes was through the media of administrative agencies and the judicial review of their decisions, the state's consent to be sued was conditional upon the pursuance of those procedures as the taxpayers' exclusive remedy. Great American Ins. Co. v. Gold, 254 N.C. 168, 118 S.E.2d 792, 795(2); Kleban v. Morris, supra, 247 S.W.2d 840."

The exclusivity of administrative remedies was reaffirmed by this [4] Court in State ex rel. Brady Motor, Inc. v. State Tax Commission *supra,* at 138:

> "The statutes creating the highway reciprocity commission and giving it certain powers and responsibilities do not expressly or by implication abrogate or repeal the preexisting statutory procedures for refund of overpaid taxes. . . . Insofar as tax refunds are concerned, the diminution of sovereignty implicit in the enactment of § 301.277, supra, enures to the benefit of these motor carriers only to the extent that they comply with the procedural requirements of Missouri's tax refund statutes."

The propriety of a state's requiring exhaustion of administrative remedies before the invalidity of a tax may be asserted in a judicial tribunal, even where constitutional claims are raised, has been recognized by the United States Supreme Court. First National Bank of Greeley v. Board of County Commissioners of the County of Weld, 264 U.S. 450 (1924).

Plaintiffs assert that "the State of Missouri may not qualify or condition federal rights by local rules of practice including Chapter 136, RSMo 1969." They argue from such assertion that they may not be relegated to § 136.035, RSMo 1969, as the exclusive remedy available to them for the recovery of taxes. We recognize that "the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." Davis v. Wechsler, 263 U.S. 22, 24 (1923). However, we do not believe that plaintiffs' claims are *defeated* by the requirement that they be pursued through use of the remedy given by § 136.035. Plaintiffs would have us hold that their assertion of "federal rights" entitles them to proceed, at their option, under the Missouri Declaratory Judgments Act and for damages rather than under § 136.035. We decline to do so. Plaintiffs must proceed under § 136.035.

We do note that unreasonable delay on the part of the State Tax Commission in making a decision on plaintiffs' refund requests may be grounds for an order of the Circuit Court either compelling action by the State Tax Commission or removing the case to the court for decision. Rule 100.03. [5]

The judgment of the Circuit Court is reversed and the cause is remanded with directions to dismiss the petition filed by plaintiffs without prejudice to the right to proceed further under §§ 136.035 and 138.430 and Rules 100.03 to 100.07, inclusive.

.....

Robert T. Donnelly, Judge

Morgan, C.J., Bardgett, Finch, Rendlen and Seiler, JJ., and Gunn, Sp.J., concur. Simeone J., not participating because not a member of the Court when cause was submitted. [6]

Appendix C

Filed on Oct. 19, 1978
In office of Clerk
Supreme Court of Missouri

Notice of Appeal From State Court, Civil Case

In the Supreme Court of the State of Missouri

ELLSWORTH FREIGHT LINES et al.,
Appellant,
v.
MISSOURI HIGHWAY RECIPROCITY COMMISSION, et al.,
Appellee.

No. 59981

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that Ellsworth Freight Lines et al., the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Missouri dismissing the petition entered in this case on July 24, 1978.

This appeal is taken pursuant to 28, U.S.C. § 1257(2).

.....

Attorney for Ellsworth Freight Lines
Appellant

HOWARD M. DOWNS
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650 California Street, 31st Floor
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(415) 956-0900

CERTIFICATE OF SERVICE BY MAIL

I, HOWARD M. DOWNS, certify as follows:

That I am over the age of eighteen and not a party to the within cause;

My business address is 650 California St., San Francisco, California 94109.

On October 16, 1978, two copies of the Notice of Appeal from State Court, Civil Case were placed in an envelope addressed as follows:

John Ashcroft, Attorney General
Richard L. Wieler, Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri 65101

Said envelope with postage fully prepaid was then sealed and deposited in United States mail in San Francisco, California.

Dated: October 16, 1978

HOWARD M. DOWNS
Attorney at Law